

Insights: Alerts

Department of Labor Releases FFCRA Regulations as Law Becomes Effective Nationwide

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force](#) page and/or your email for updates.

As we wrote about previously ([here](#)), the Families First Coronavirus Response Act (“FFCRA” or “the Act”) which was signed into law on March 18, 2020, became effective nationwide on April 1, 2020. The same day, the U.S. Department of Labor (“DOL”) issued its highly anticipated [regulations](#) related to the Act. These regulations add to the DOL’s previously released [Fact Sheet for Employees](#), [Fact Sheet for Employers](#), and [Frequently Asked Questions](#). The regulations were issued as a “temporary rule,” which allowed the DOL to forgo the comment period that accompanies most rule making processes become effective immediately. The DOL explained that there was “good cause” for this approach due to the short time period between the passing of the Act (March 18) and its effective date (April 1). The regulations address the new leave provisions created by the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”).

The DOL’s regulations were largely consistent with Kilpatrick Townsend’s prior guidance available [here](#). Below we highlight key provisions from the DOL’s regulations:

GENERAL PROVISIONS

- **The Regulations are of Limited Duration.** The DOL regulations are of limited duration, and will expire on December 31, 2020, absent additional legislation. The regulations make clear that neither the FFCRA nor the regulations have any “affect [on] the FMLA after December 31, 2020.”
- **The Regulations Address Both FFCRA and CARES Act Provisions.** Because the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), signed into law on March 27, 2020, amends portions of the leave provisions created in the FFCRA, the regulations address provisions under both coronavirus relief laws. Specifically, the CARES Act “amended the FFCRA by providing certain technical corrections, as well as clarifying the caps for payment of leave; expanded family and medical leave to certain employees who were laid off or terminated after March 1, 2020, but are reemployed by the same employer

prior to December 31, 2020; and provided authority to the Director of the Office of Management and Budget (OMB) to exclude certain Federal employees from paid sick leave and expanded family and medical leave.”

- **How Employers Should Count Employees.** Employers should only count employees who are employed within the United States, which includes individuals employed in “a U.S. State, the District of Columbia, or a territory or possession of the United States.” (Notably, this differs from the definition of “employee” under the FLSA, upon which the FFCRA relies.) When counting individual employees, employers should “include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency.” However, employers should not count as “employees” individuals who are independent contractors or “workers who have been laid off or furloughed and have not subsequently been reemployed.”
- **Documentation Requirements.** Before taking leave under the FFCRA, employees are required to provide the following pieces of information: (1) the employee's name; (2) dates for which leave is requested; (3) the qualifying reason for leave; and, (4) an oral or written statement that the employee is unable to work because of the qualified reason for leave.

Additionally, depending on the reason for leave, the employee will be required to provide further information. Specifically, if requesting leave:

- due to a quarantine or isolation order, the employee must provide the employer with the name of the government entity that issued the order;
- because a health care provider recommended the employee quarantine or self-isolation due to COVID-19, the employee must provide the employer with the name of the health care provider;
- to provide care for another individual who is subject to a quarantine or isolation order, the employee must provide the employer with the name of the government entity that issued the order;
- to provide care for another individual because a health care provider recommended the employee quarantine or self-isolation due to COVID-19, the employee must provide the employer with the name of the health care provider;
- in order to provide care for a son or daughter whose school/care facility closed or is unavailable due to COVID-19, the employee must provide the employer with (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that is closed or otherwise unavailable; and, (3) a representation that no other suitable person will be caring for the son or daughter while the employee takes leave under either the EPSLA or FMLA Expansion Act.

Finally, the employer may also request that the employee provide any additional information that would be needed in order for the employer to support a request for tax credits under the Act. Notably, an employer

“is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided” (emphasis added).

- **Recordkeeping Requirements.** Employers must retain for four (4) years all “documentation provided” by an employee who is documenting his or her need for leave (as discussed above), regardless of whether the request for leave was granted or denied. If an employee provided oral statements to support his or her request for leave under the FFCRA, the employer is required to document and maintain such information in the employer's records for four (4) years.
- **Available Exemptions for Small Businesses.** The new regulations further describe the small business exemption, which the DOL was given authority to allow. The DOL stated that:

“In exercising its authority to exempt certain employers with fewer than 50 employees, the [DOL] balanced two potentially competing objectives of the FFCRA. On the one hand, the leave afforded by the FFCRA was designed to be widely available to employees to assist them navigating the social and economic impacts of COVID-19 as well as public and private efforts to contain and slow the spread of the virus. On the other hand, the [DOL] recognizes that FFCRA leave entitlements have little value if they cause an employer to go out of business and, in so doing, deny employees not only leave but also jobs.”

Accordingly, the DOL created three situations or carve outs that would qualify a small employer (with less than 50 employees) for an exemption from its obligation to provide an employee leave to care for a child. Those reasons include:

- (1) “such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;”
- (2) “the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities;” and/or,
- (3) “the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

In these limited instances, small businesses may qualify for an exemption from an employee's requested leave to provide child care under the EPSLA and the FMLA Expansion Act. However, notably, these exemptions do not excuse even small employers from the two-week paid sick leave established by the EPSLA for the remaining five reasons that do not relate to providing child care for COVID-19 related reasons.

If an employer decides to deny requested leave for one of these reasons, the employer “must document the facts and circumstances that meet [this] criteria [] to justify such denial.” The determination of the Company's exemption should be made by its “authorized officer.” “The employer should not send such material to the [DOL], but rather should retain such records for its own files.” The employer must retain such documentation for four (4) years.

- **No Distinction Between Non-Profit and For Profit Employers.** The regulations make clear that there is no distinction between non-profit and for profit employers under the Act.
- **Definitions Relied Upon in the Act, Generally.** The DOL regulations will appear in new Part 826 of Title 29 of the Code of Federal Regulations. Section 826.10 contains definitions of terms used in the rule issued by the DOL, the EPSLA, and the FMLA Expansion Act. The majority of the terms found in the EPSLA and the FMLA Expansion Act rely on terms previously defined in other statutes and/or their implementing regulations, including, primarily, the FMLA and FLSA. As one example, “the EPSLA expressly adopts the definition of ‘person’ from the FLSA and the definition of ‘son or daughter’ and “health care provider” from the FMLA.”
- **The Definition of Telework and its Relationship to the Existing Continuous Workday Guidance.** The regulations draw specific attention to the definition of “telework.” While the existing FLSA regulations and guidance generally apply to employees who are teleworking for COVID-19 related reasons, the DOL has concluded that its continuous workday guidance under the FLSA is “inconsistent with the objectives of the FFCRA and CARES Act,” with respect to employees who are teleworking for reasons related to COVID-19.

The DOL regulations note that “FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons.” This goal, the DOL noted, is inconsistent with Section 790.6 of the FLSA regulations and the DOL's “continuous workday guidance,” which “generally provide[s] that all time between performance of the first and last principal activities is compensable work time.” See 29 CFR 790.6(a). Accordingly, the DOL determined that an employer who allows its teleworking employee additional flexibility during the COVID-19 pandemic “shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked.” The DOL was clear, however, that Section 790.6 and existing guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID-19 related reasons.

- **The Relationship between the Two Sick Leave Provisions.** The DOL expressly acknowledged that the EPSLA and the FMLA Expansion Act were designed to work together, specifically in light of the two week unpaid provisions of the FMLA Expansion Act. The DOL stated that Congress intended to permit an employee to have a continuous income stream while taking FFCRA paid leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID-19

related reason.” Thus, the regulations provide that “the benefits provided by the EPSLA run concurrently with those provided under the [FMLA Expansion Act].”

- **Intermittent Leave Only Where the Employer and Employee Agree.** Subject to the text of the regulations, employees may only take intermittent leave under the FFCRA when he/she and the employer agree. Further, intermittent leave is generally permitted when it is requested to care for the employee's child or children, regardless of whether the employee is teleworking or reporting to the worksite.

In contrast, if an employee is still reporting to the employer's worksite, he or she may not take intermittent leave for any of the remaining five (5) reasons identified in the EPSLA (because he/she is under quarantine or isolation order; based on the recommendation of a health care provider; because he/she has symptoms of COVID-19 and is seeking treatment; because he/she is caring for another individual under quarantine orders by a governmental entity or health care provider; or, because he or she is experiencing a similar issue to COVID-19 as defined by the Department of Health and Human Services). However, if the employee is teleworking, and the employer agrees, an employee may take intermittent leave for any of these qualifying reasons.

This leave (under the EPSLA or the FMLA Expansion Act) may be taken in whatever intervals the employee and employer agree to, but only the leave actually taken by the employee will count against his/her entitlements. While employers and employees are not required to memorialize such an agreement in writing by the regulations, such written confirmation is recommended as a best practice.

- **Notice Requirements for Employers.** Every employer covered by the paid leave provisions of the FFCRA must post and keep posted on its premises, in conspicuous places, a notice explaining the paid leave provisions and providing information concerning the procedures for filing complaints of violations of the FFCRA with the Wage and Hour Division of the DOL. This requirement may be satisfied by “emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.” Employers may use the notices provided by the DOL on its website, or may use another format (so long as it includes, at a minimum, all of the information on the DOL's model notices).

EMERGENCY PAID SICK LEAVE ACT PROVISIONS

The EPSLA provides six reasons whereby an employee may be eligible for up to two weeks of paid sick leave. Those reasons guided the DOL's regulations and are further discussed below.

- **Eligibility for Leave.** An employee is eligible for paid sick leave under the EPSLA regardless of the duration of his/her employment.
- **When an Employee is Subject to Quarantine and Isolation Orders.** Under the FFCRA, the first reason that an employee would be entitled to paid sick leave (under the EPSLA) is when the employee is subject to quarantine or isolation orders. The regulations make clear that quarantine or isolation orders “include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.” However, the qualifying reason for EPSL

under the EPSLA provisions of FFCRA do not apply to employees who cannot work because their employer closes due to lack of business, regardless of whether that closure is temporary or permanent. According to the DOL, the prominent question is: “whether the employee would be able to work or telework ‘but for’ being required to comply with a quarantine or isolation order.” If a business is closed due to lack of work, business, or other reasons, then the employee would not be eligible to work or telework, and is not, accordingly, eligible for the paid sick leave under the EPSLA. The regulations make clear, however, that the same employee impacted by the closure may be eligible for state unemployment benefits, which have been greatly expanded under the FFCRA and CARES Act.

- **When an Employee is Advised to Self-Quarantine by a Health Care Provider.** The second reason that an employee would be entitled to paid sick leave under the EPSLA is when the employee is advised to self-quarantine by a health care provider. The advice to self-quarantine must be based on a health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. Further, the self-quarantine must prevent the employee from working – which includes teleworking. Even where an employee is self-quarantined, however, he or she must still be unable to telework to qualify for the paid leave. If the employer has work for the employee to perform, permits the employee to telework from the location where the employee is self-quarantining, and there are no extenuating circumstances (like serious COVID-19 symptoms) that prevent the employee from teleworking, the self-quarantined individual would not be eligible for paid leave.
- **When an Employee has Symptoms of COVID-19 and is Seeking Medical Diagnosis.** The third reason for paid sick leave under the EPSLA exists when an employee is experiencing symptoms of COVID-19 and seeks a medical diagnosis. The regulations specify the applicable symptoms for this provision, which are based on CDC guidance and include fever, dry cough, shortness of breath, trouble breathing, persistent pain or pressure in the chest, new confusion or inability to arouse, and bluish lips or face. This time off is limited to the time where the employee cannot work or telework because he or she is taking affirmative steps (making an appointment, waiting for the appointment, seeing the doctor, etc.) to obtain a medical diagnosis. However, the employee may not take sick time under this provision of the EPSLA without seeking a diagnosis.
- **When an Employee is Unable to Work Because He/She is Providing Care to a Covered Individual.** The fourth reason for paid sick leave under the EPSLA applies when an employee is unable to work or telework because he or she is providing care for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine by a health care provider for COVID-19 related reasons. The regulations make clear that this reason applies only where the employee has “a genuine need” to care for the individual, providing this care would keep the employee from working or teleworking, and the individual requiring care meets the same thresholds established under the first two prongs discussed above. The individual in question must be “an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.”
- **When an Employee is Unable to Work Due to Providing Childcare.** The fifth way that an employee may qualify for paid sick leave under the EPSLA is when the employee is unable to work or telework

because the employee must care for a son or daughter whose school/place of care has closed or is unavailable due to COVID-19 related reasons. The regulations are clear that this will not apply to employees whose employer does not have work for the employee to perform due to a closure or reduced hours. Moreover, the employee is only entitled to take leave under this prong when the employee “needs to” and is actually caring for the son or daughter. If another suitable caretaker is available to care for the child (like a co-parent, co-guardian, or the usual care provider), the employee may not utilize this paid leave.

- **When an Employee is Experiencing Substantially Similar Conditions.** The regulations provide that when an employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, he or she is also eligible for paid sick leave under the EPSLA.

EMERGENCY FAMILY AND MEDICAL LEAVE ACT PROVISIONS

- **Eligibility for Leave.** An employee is eligible for paid sick leave under the FMLA Expansion Act once he/she has been employed by a covered employer for at least 30 calendar days. The 30 day period is calculated as the 30 calendar days immediately preceding when the employee's leave is scheduled to begin. “For example, for an employee to be eligible to take leave under the [FMLA Expansion Act] on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020.”
- **When an Employee is Unable to Work Due to Providing Childcare.** The FMLA Expansion Act clarifies that an employee may take up to 12 weeks of leave, 10 of which are paid at 2/3 salary (up to \$200 per day/\$1000 per week), when the employee is unable to work or telework because the employee must care for a son or daughter whose school/place of care has closed or is unavailable due to a “public health emergency.” While the FMLA Expansion Act defines a “public health emergency” as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority,” the DOL has chosen to interpret this as consistent with the fifth reason for leave under the EPSLA, which has a definition of “for reasons related to COVID-19.” The DOL felt that “having different rules under the [FMLA Expansion Act] and the EPSLA for when an employee may take leave to care for his or her son or daughter” would have “significant disadvantages.”
- **Relationship to Existing FMLA Leave Entitlements.** The DOL confirms that the FMLA Expansion Act does not alter an employee's total entitlement of 12 weeks of leave under the FMLA and/or the FMLA Expansion Act. Accordingly, an employee who already utilized 6 weeks of FMLA leave in the statutory period for a non-COVID-19 related reason, would only have 6 weeks of FMLA leave available for the remainder of the 12-month period, which the employee could use for COVID-19 related reasons OR any other FMLA acceptable leave. The FFCRA does not increase the total leave allowed under the FMLA above the existing 12-week period.

As with all things COVID-19 related, the situation is rapidly evolving with near constant changes and updates. Accordingly, will continue to monitor the situation and report through our [Task Force](#), [insights](#), [webinars](#), and

other client communication.

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